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Supreme Court, Bronx County, People v. Paul

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SUPREME COURT OF NEW YORK
BRONX COUNTY

People v. Paul[1]
(decided February 4, 2005)

Ahib Paul was convicted of two counts of second degree murder, first degree manslaughter, attempted robbery and criminal possession of a weapon.[2] As a repeat offender, the jury sentenced him to twenty years to life in state prison.[3] On appeal, Paul argued that the admission of certain hearsay testimony at trial constituted a violation of his right to confront his accuser pursuant to the Sixth Amendment of the Federal Constitution as well as article I, section 6 of the New York State Constitution.[4] The contention was not properly preserved for appeal since Paul failed to make a timely objection at trial.[5] However, the court explored the issue and found that regardless, no basis for reversal existed.[6]

Derrick "Ginger" Thompson was shot and killed on July 1, 2001 during an altercation on a Bronx street.[7] At trial, an eyewitness

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[1] 803 N.Y.S.2d 66 (App. Div. 1st Dep't 2005).
[2] *Id.* at 67, 71.
[3] *Id.* at 71.
[4] *Id.* at 68. U.S. CONST. amend. VI states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." N.Y. CONST. art. I, § 6 provides in relevant part: "In any trial . . . the party accused shall be . . . confronted with the witnesses against him or her."
[5] *Paul*, 803 N.Y.S.2d at 69.
[6] *Id.*
[7] *Id.* at 67.

identified Paul as the assailant.[8] During the witness's testimony, she claimed to be familiar with Paul, whom she knew from a previous incident during which he sold her marijuana and claimed to work for Ginger, her usual supplier.[9] The witness testified that on the evening of the murder, after purchasing marijuana from Ginger, she returned to her apartment and sat in front of a window from which she could clearly see Ginger on the street below.[10] Soon after, the witness observed Paul approach Ginger and watched as the two engaged in a physical confrontation.[11] She then stated that she saw Paul pull a gun on Ginger and shoot at him twice; the second bullet knocked Ginger to the floor.[12] The witness stated that Paul then rummaged through Ginger's pockets before casually walking away.[13] She telephoned 911 and ran to Ginger's side with another neighbor who saw Ginger waiving for help.[14]

At trial, both witnesses were permitted to testify that while sitting with Ginger and awaiting police arrival, Ginger repeatedly stated to them that he was dying and that the defendant had shot him.[15] The trial court admitted Ginger's hearsay statement as a dying declaration, which the appellate court upheld since it was reasonable to assume that Ginger knew he was about to die at the time he

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[8] *Id.* at 68.
[9] *Id.* at 67.
[10] *Paul*, 803 N.Y.S.2d at 68.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Paul*, 803 N.Y.S.2d at 68.

inculpated Paul.[16] However, on appeal Paul claimed that while subject to a hearsay exception, Ginger's dying declaration was "testimonial," and under the Supreme Court's ruling in *Crawford v. Washington*,[17] should have been excluded in order to protect his Sixth Amendment right.[18]

In resolving the issue, the court explained that the Supreme Court's decision in *Crawford* left unanswered the question as to what definitively constitutes a "testimonial" statement in contexts such as the case at bar.[19] However, two schools of thought exist.[20] Under the first view, which was set forth by Professor Richard Friedman, a hearsay statement is testimonial and implicates the Confrontation Clause when it is uttered by a declarant who expects it to be used in the investigation or prosecution of the crime.[21] Thus, Ginger's statement would be considered testimonial regardless of who he spoke to as long as he believed the statement would assist the pursuit of justice.[22] Under the second view espoused by Professor Akhil Reed Amar, a hearsay statement is testimonial only if it was "prepared by the government for in court use."[23] Accordingly, accusations made informally between private persons such as Ginger and the eyewitnesses outside of court do not apply.[24]

After laying out the divergent schools of thought, the court

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[16] *Id.* at 68-69.
[17] 541 U.S. 36 (2004).
[18] *Paul*, 803 N.Y.S.2d at 69.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Paul*, 803 N.Y.S.2d at 69.

stated that New York adheres to Amar's interpretation and looks to the degree of formality surrounding the statement's utterance.[25] In applying this approach, the court concluded that Ginger's statements to the two eyewitnesses did not rise to the level of "testimonial" because they were voluntarily made as opposed to being elicited by structured police questioning during the course of an investigation.[26] Finding that the statement did not infringe upon Paul's right to confront his accuser under *Crawford*,[27] the court affirmed the conviction.

In *Crawford v. Washington*, the United States Supreme Court dealt with the admissibility of statements made by unavailable witnesses at trial in relation to the defendant's constitutional right to confront his accusers.[28] In that case, the defendant stabbed a man who he claimed attempted to rape his wife.[29] To rebut the defendant's self-defense claim that the victim was the first aggressor, the state introduced tape recorded contradictory statements that his wife made to police regarding the incident.[30] The defendant claimed that admitting the testimony violated his constitutional right to confront his accuser because under the state marital privilege, his wife could not be compelled to take the stand for cross-examination.[31]

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[24] *Id.*
[25] *Id.*
[26] *Id.* at 70.
[27] *Id.* at 70, 71.
[28] 541 U.S. 36 (2004).
[29] *Id.* at 38.
[30] *Id.* at 40.
[31] *Id.*

The Court held that admitting the tape recorded statements violated the defendant's Sixth Amendment right because the defendant did not have an opportunity to cross examine his wife.[32] In the course of its decision, the Court established that, for purposes of the Sixth Amendment, testimonial evidence may not be introduced absent unavailability of the declarant as a witness, along with a prior opportunity by the opposing party to cross examine the declarant regarding the statement.[33] The Sixth Amendment of the Federal Constitution was established to protect against the abuses of civil-court proceedings, in which ex parte examinations of witnesses were introduced substantively at trial.[34] Indeed, the text of the amendment explicitly applies to those witnesses who "bear testimony" against the accused.[35] Although the *Crawford* Court "[left] for another day any effort to spell out a comprehensive definition of 'testimonial,' "[36] it did establish that the term applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[37]

In light of the Supreme Court's pronouncement of what the Confrontation Clause requires, New York State courts have attempted to make sense of what constitutes a "testimonial" statement for evidentiary purposes. In *People v. Bradley*, the defendant was on trial for allegedly assaulting his girlfriend by pushing her through a

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[32] *Id.* at 68.
[33] *Crawford*, 541 U.S. at 68.
[34] *Id.* at 50.
[35] *Id.* at 51.
[36] *Id.* at 68.
[37] *Id.*

glass door.[38] At trial, the arresting officer testified that upon responding to the 911 call placed by the victim, he observed a broken glass door and a female who was visibly shaken and covered in blood.[39] The officer testified, "I asked her what happened, and she stated her boyfriend threw her through a glass door."[40] The defendant objected claiming that the statement made to the officer by the girlfriend (whose whereabouts were unknown at the time of trial) was testimonial and thus, should have been excluded pursuant to *Crawford*.[41] The defendant claimed the statement was "elicited from the victim by the officer pursuant to an investigation, thereby rendering the question part of a structured interrogation," and therefore, fell within the protections of *Crawford*.[42] Applying the Friedman approach, the defendant claimed that it was rational for his girlfriend to assume that any statement she made to police would be used to prosecute him since she already had an order of protection against him.[43]

In rejecting his claim, the appellate court looked at the circumstances under which the victim's statement was made. The court characterized the interaction between the girlfriend and the police officer as the complete opposite of the structured nature of interrogation at issue in *Crawford*.[44] Indeed, "[i]t is difficult to imagine a more spontaneous, general and preliminary inquiry

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[38] 799 N.Y.S. 472, 474 (App. Div. 1st Dep't 2005).
[39] *Id.* at 474.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 475.
[43] *Bradley*, 799 N.Y.S. at 475.

addressed in an unstructured context than a police officer arriving at a crime scene and merely asking, 'What happened?' "[45] Moreover, brief, informal remarks made by an officer during a field investigation are not analogous to the civil-law abuses of England where testimony was taken by deposition or private judicial inquiry; the exploitation of which, *Crawford* sought to address.[46]

Some jurisdictions would go so far as to only recognize statements as testimonial if made at a police station,[47] but *Bradley* focused on the intent of the questioning officer at the time the statement was made.[48] That court refused to accept the defendant's contention that the decision should be based on whether the declarant was aware that the statement could be used in furtherance of prosecution or investigation.[49] When the officer is simply attempting to gain a cursory understanding of the incident, the declarant's response is not elicited as part of an official interrogation and is therefore, not testimonial within the meaning of *Crawford*.[50]

People v. Diaz further emphasized the importance of the circumstances under which the declarant's statement must be elicited in order to qualify as "testimonial" in New York.[51] In that case, the defendant was on trial for a gang assault which resulted in the victim

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[44] *Id.* at 477.
[45] *Id.*
[46] *Id.* at 478 (citing Hammon v. Indiana, 809 N.E.2d 945 (Ind. App. 2004)).
[47] *Id.* (citing *Hammon*, 809 N.E.2d at 947 (Ind. App. 2004)).
[48] *Bradley*, 799 N.Y.S. at 480.
[49] *Id.*
[50] *Id.*
[51] 798 N.Y.S.2d 21 (App. Div. 1st Dep't 2005).

requiring emergency medical assistance.[52] As the victim lay in an ambulance at the crime scene, the police brought the defendant and other suspects over to him.[53] According to police testimony at trial, the victim's eyes lit up and he stated, "that's them," in reference to the men who attacked him.[54] Post-conviction, the defendant argued that the statement of the victim (who was unavailable at trial) was testimonial and its admission at trial constituted a violation of his right to confrontation under *Crawford*.[55]

The court recognized the defendant's contention that *Crawford* held a statement to be testimonial when the declarant knowingly makes it in response to police questioning.[56] Nevertheless, the inquiry must explore the circumstances under which the declaration was elicited.[57] In *Diaz*, the victim's statement was categorized as an excited utterance.[58] The court noted that the nature of an excited utterance is a crucial factor in determining whether it is testimonial.[59] Under the court's interpretation, *Crawford* was concerned with the level of formality surrounding the elicitation of the declaration in comparison to the thoughtful response required by a deposition or affidavit.[60] Because the statement of the victim in *Diaz* was a "visceral response" to seeing his attackers and it was volunteered, as opposed to elicited via structured police

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[52] *Id.* at 23.
[53] *Id.* at 24.
[54] *Id.*
[55] *Id.* at 22.
[56] *Diaz*, 798 N.Y.S.2d at 26.
[57] *Id.*
[58] *Id.* at 27.
[59] *Id.*

interrogation, the court did not deem it testimonial.[61] Accordingly, it was determined that voluntary statements made spontaneously to police do not fall within the *Crawford* definition of testimonial in New York.[62]

In *People v. Coleman*, the court found "little support in *Crawford*" for the defendant's contention that any intentional report of criminal activity to an official should be considered testimonial for purposes of the Confrontation Clause.[63] In that case, an unidentified caller placed a 911 call to obtain medical assistance for victims of a violent attack.[64] The court noted that the 911 operator followed no official protocol in obtaining information from the caller.[65] The only significant question asked of the caller was the identity of the attacker.[66]

The caller presumably identified the defendant as the assailant, but this alone did not render the declarant's statement testimonial at trial.[67] While the declaration was made in response to the operator's question regarding the assailant's appearance, that question did not bring the statement within *Crawford*. The court explained that such an interaction is an exception to *Crawford* recognized as "questions delivered in emergency situations to help

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[60] *Id.*

[61] *Diaz*, 798 N.Y.S.2d at 28.

[62] *Id.* (citing People v. Newland, 775 N.Y.S.2d 308, 311 (App. Div. 1st Dep't 2004) which stated "brief informal remark to an officer conducting a field investigation, not made in response to 'structured police questioning' should not be considered testimonial . . . .").

[63] 791 N.Y.S.2d 112, 113-14 (App. Div. 1st Dep't 2005).

[64] *Id.* at 113.

[65] *Id.* at 114.

[66] *Id.*

[67] *Id.*

police nab . . . assailants."[68] Furthermore, were the court to adopt the alternate Friedman approach to testimonial statements, the declarant's description of the attacker still would not constitute a testimonial statement since the declarant's motive in making the call was to obtain medical assistance, not to implicate the defendant.[69]

Since the Supreme Court decision in *Crawford v. Washington*, courts in every jurisdiction have grappled with attempting to determine what constitutes a testimonial statement for purposes of the Confrontation Clause. Some jurisdictions apply the Friedman approach and thus, ascertain the statement's status based on whether the declarant reasonably knew that the statement would be used as part of an official investigation or prosecution. Yet, New York has adopted the Amar approach, which focuses on the intent of the questioner based on surrounding circumstances.

New York courts have interpreted *Crawford* to be aimed solely at situations embodying the inquisitorial abuses of the ex parte civil-law system in which testimony was taken in secret and used against the defendant who remained powerless to probe accusations. In holding to this historical view, New York looks to the position of the questioner, and the degree of formality surrounding the inquisition. This includes whether the questioning proceeded in a structured manner pursuant to official protocol. While this position will necessarily limit the number of statements admissible pursuant to

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[68] *Coleman*, 791 N.Y.S.2d at 114 (citing Mungo v. Duncan, 393 F.3d 327 (2d Cir. 2004)).
[69] *Id.* at 114.

hearsay exceptions, it does maintain the historical convictions behind the Confrontation Clause itself.

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DOUBLE JEOPARDY

United States Constitution Amendment V:

[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .

New York Constitution article I, section 6:

No person shall be subject to be twice put in jeopardy for the same offense . . . .